No. 3058.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

S. C. ADAMS,
Appellant,

vs.

YUKON GOLD COMPANY (a Corporation), W. A. DIKEMAN, JOHN BEATON, THOMAS P. AITKEN, RAE B. CARTER, P. F. STIMLEY and TOM DAVIS,
Appellees.

BRIEF FOR APPELLEES.

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Filed this.....day of February, A. D. 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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FILED

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STATEMENT OF THE CASE.

This is a suit in equity brought by the plaintiff below and appellant in this court to quiet title to two portions of placer mining ground, situate in the Otter Mining and Recording District, Territory of Alaska; said two parcels of land being known and recorded respectively as "Anaconda Fraction Placer Mining Claim," and "Anaconda Fraction No. Two Placer Mining Claim." The first of the two parcels was located by appellant in the month of May, 1911, and is 120 feet in width by 2640 feet in length; the second location was made by appellant in the month of

July, 1913, and is, as described in its location notice 125 feet in width by 5280 feet in length; the second location embraces within its exterior boundaries all the ground covered by the first location.

The appellees in their answer set up that said two fractional placer claims are parts and portions of the "Prospector Association Placer Mining Claim," located and acquired by them and their grantors long prior to the location of either of said two fractional claims and that the latter two locations lie wholly within the exterior boundaries of said Prospector Association Claim and for that reason are void.

In his reply the appellant admits that said two fractional claims contain portions of said Prospector Association Claim but maintains that said Prospector Claim was excessive in area, as marked upon the ground, that defendants learned of such excess and failed to cast off the same, that appellant then attempted to take up such excess area by locating the "Anaconda Fraction" in May, 1911, and that in July, 1913, he located the "Anaconda No. 2," embracing all of the former location and some additional ground.

Both parties admit that the excess area contained within the Prospector Association Claim was taken in by honest mistake and without any design or intention of acquiring by one location made by eight persons, more than one hundred and sixty acres.

The appellant contends that he had a right to make his two fractional locations, thereby taking up the excess contained within said Prospector Association Claim, after he had obtained permission to do so from

two of the eight owners and locators of said Prospector Claim.

The appellees contend, *first,* that appellant failed to inform the locators and owners of said Prospector Claim that it was excessive in area, after he acquired knowledge thereof, either at the time he made his first or second location, or at all, and that appellees, after acquiring such knowledge, caused a survey of said Prospector Claim to be made and immediately after ascertaining that said claim was excessive in area cast off such excess, drew in their boundaries and corner stakes, made an amended location of said Prospector Claim and posted and recorded an amended location notice, and, *second,* that even if all the locators and owners of said Prospector Association Claim had full knowledge of the fact that said claim contained an excessive area and having such knowledge within a reasonable time failed to cast off such excess, the appellant nevertheless could not prevail for the reason that both his locations were made in such shape or form as is not countenanced by the laws of the United States, nor by local rules, customs or regulations, nor by the rulings of the Land Department, and that both of said locations are what has been described as "Shoestring Locations."

The contention in this case concerns the location of the excess area contained within the exterior boundaries of the Prospector Association Claim.

The cause was tried in the lower court by the Hon. F. E. Fuller in 1914, who, after hearing the testimony reserved his decision for some time and then

wrote his opinion in favor of defendants. The opinion is attached to this brief. Owing to the fact that said Fuller decided said cause at Fairbanks, Alaska, approximately one thousand miles from where the premises in controversy are situate and where the parties and their counsel resided, said judge allowed sixty days for the submission of findings of fact and conclusions of law and for filing of objections thereto, but before such findings could reach said Fuller he resigned as District Judge, leaving this cause decided by him in favor of defendants, appellees herein, but without findings of fact and conclusions of law or a decree signed by him. Thereafter the Hon. Chas. E. Bunnell, successor to said Hon. F. E. Fuller, tried the cause *de novo* and gave his decision, findings and decree in favor of defendants, appellees herein. From this latter decision the present appeal is taken.

ARGUMENT.

The appellant asks this honorable Court to reverse the decree of the Lower Court upon certain errors alleged to have been committed by the Trial Court.

These assignments of error (as taken up by appellant in his brief) may be grouped into two classes, viz.:

First: The appellant claims the Lower Court committed error in finding as a fact that he, appellant, failed to give the locators and owners of the Prospector Association Claim an opportunity to ascertain that said claim contained an area in excess of one hundred and sixty acres and that after appellant knew of such excess he failed to give notice thereof to the appellees,

except as to two of them, and failed to give them an opportunity, except as to said two, to cast off such excess.

Second: The appellant claims the Lower Court committed error in finding as a fact that he could have located the excessive area contained within said Prospector Association Claim in some more compact form than was done by him, and that he made, what has been termed "Shoestring locations", when he located his two fractional claims.

We will proceed to consider whether or not these findings of the Court are supported by the evidence and law as applicable to this case.

(1) *Did the Court err in finding that the locators and owners of the Prospector Association Claim, except the locators and owners Chittic and Muckler, prior to the locations made by appellant, never knew that said Prospector Association Claim contained an area in excess of one hundred and sixty acres?*

It is fully established by the testimony, without contradiction, that the Prospector Association Claim was located on the 10th day of April, 1909; that the boundaries thereof were marked upon the ground so that the same could be readily traced; that a substantial discovery of gold was made by the locators within the exterior boundaries thereof and that a properly executed location notice was posted and recorded in the office of the recorder in whose recording district the premises are situate. (Test. of John Beaton, Pr. Rec., p. 91 *et seq.*)

There is no contention made by appellant that the location of the Prospector Association Claim was made fraudulently or that the excess area was taken in otherwise than by honest mistake.

It is clear then that this case comes squarely within the rulings of this honorable Court in *"Jones* vs. *Wild Goose Mining and Trading Company",* where it was held that the original locator and his grantor, has the exclusive right to the possession of the entire location, including the excessive area, until notice of the excess has been brought home to him and an opportunity afforded him to cast off such excess.

> "A placer claim located in good faith is not wholly void because it is in excess of twenty acres (160 acres in case of association claim located by eight persons) but it is void only as to the excess which may be rejected from any portion the owner may select and until he has been advised about the excess and has had a reasonable time to make his selection, his possession extends to the entire claim, and another who goes upon it and makes a location of any part is a trespasser and his location a nullity and void for any purpose."
>
> *Jones* vs. *Wild Goose M. & T. Company,* 177 Fed. 95.

On the 23d of May, 1911, when appellant made his first location, the following named persons were the locators and owners of said Prospector Association Claim, to-wit: W. A. Dikeman, John Beaton, John Duncan, Ira Van Orsdale, P. F. Stimley, Tom Davis, James Muckler, Wm. Pillar, L. Blackburn and C. C. Chittick. (Pr. Tr., p. 114.)

It nowhere appears in the record that the appellant

made any honest effort to ascertain who the owners of said Prospector Claim were at the time he made his first location and he expressly admits (Pr. Tr., p. 62) that he never went to the recorder's office to learn who the locators and owners of said claim were although this office was but six or seven miles from where said Prospector Claim is situate. (Pr. Tr., p. 62.)

The only notice of the excess that he fairly tries to bring home concerns the two locators Chittick and Muckler, both of whom were dead at the time of the trial of this cause. (Pr. Tr., pp. 49 and 50.) But even as to these two, appellant admits to merely having made a suggestion to them of the possibility of said Prospector Claim being excessive. He testifies:

> "Q. Did you tell Chittick and Muckler that it (the Prospector Claim) was excessive?
> "A. I told them I thought it was.
> "Q. But you never told them at any time as a matter of fact that it was excessive?
> "A. Not to my knowledge."

It is not shown that appellant made any honest effort to inform any of the remaining co-owners of the fact that said Prospector Claim was excessive. Several of these owners were well known in the camp and maintained homes on Otter Creek, on which creek said Prospector Claim is located. (Pr. Tr., p. 99 *et seq.*)

As it nowhere appears in the record that appellant made an honest effort to inform the owners of said Prospector Claim that it was excessive, except as to Chittick and Muckler, and as it nowhere appears that

they had knowledge of such excess, but, on the contrary, it does appear that they had not until after the commencement of this action (Pr. Tr., pp. 85 and 99), how then can appellant claim that the Trial Court committed error when it found that "On the 23d day of May, 1911, while said Prospector Claim was a valid, subsisting mining location and while the locators thereof and their grantees had no notice or knowledge that said placer claim contained an area in excess of 160 acres, except the locators Chittick and Muckler, plaintiff entered, etc."

It will be noticed that appellant, in his proposed finding of fact numbered 6 admits that some of the owners could have been reached by plaintiff and appellant had he made an honest effort to do so and that none of the owners, except Chittick and Muckler, had knowledge or notice of the fact that said Prospector Claim was excessive in area. This proposed finding reads:

> "6. That between the time when plaintiff measured the Prospector Association and at the time when he staked the Anaconda Fraction, some of the owners of the Prospector were not in the vicinity of the Prospector and plaintiff did not give actual notice of his location of said Anaconda Fraction to any of said owners except Muckler and Chittick, etc." (See Pr. Tr., p. 21.)

And the Hon. F. E. Fuller, who first tried this cause, in his opinion hereto attached, comes to the same conclusions when he states, "Some of the owners of the Prospector were not in the vicinity, nor known to the plaintiff and their permission to locate any excess

was never obtained nor does it appear that they had knowledge thereof prior to the commencement of this action."

We respectfully submit that the Trial Court was justified under the evidence in finding that at the time appellant made his first location the locators and owners of said Prospector Claim had no notice or knowledge that said claim contained an excessive area except the locators Chittick and Muckler.

The situation was not different when appellant made his second location on the 19th day of July, 1913.

He clearly testifies (Pr. Tr., p. 68) that he did not see any of the then owners of said Prospector Claim and it nowhere appears that he informed them or that they had notice or knowledge of the fact that said claim contained an excessive area. And he never examined the records to ascertain the ownership of said Prospector Claim until "in this trial last year" and this testimony was given in 1915 and the "trial last year" was 1914.

In connection with the making of his second location the appellant again relies upon his conversation with Chittick and Muckler in April, 1911, and further claims that during the summer of 1912 he tried to sell various mining interests, including his first location, to the appellee, Yukon Gold Company, and that in that connection he mentioned his Anaconda Fraction to one E. A. Austin, the manager for said Yukon Gold Company.

Appellant's testimony upon this point is quite unsatisfactory and indefinite. He does not claim that

a map used during this conversation, showed clearly the location or designation of his fraction, and he infers that "Mr. Austin, as I took it, knew my fraction was there." (Pr. Tr., p. 65.) The witness, Austin, testifies (Pr. Tr., p. 80), that when this conversation took place the appellant explained that among several others he had a fraction between the Prospector and the adjoining Mohawk Association claim, that at no time did the appellant explain to him that his fraction was a portion of the original Prospector Claim and that appellant gave him to understand that he had acquired a strip of ground lying between two other mining claims, and that such strip, at the time of the location thereof, had been unappropriated public domain, and that the witness, upon investigation, found that no such fractional claim existed between said two claims. The testimony upon this point is as follows (Testimony of appellant, Pr. Tr., p. 64 *et seq.*):

> "Q. So when you had the conversation with Mr. Austin you offered to sell him your Great Falls Fraction?
> "A. Yes sir.
> "Q. Between the Myrtle and the Mohawk?
> "A. Yes sir.
> "Q. Your Anaconda Fraction between the Prospector and the Mohawk?
> "A Yes.
> "Q. And the North Butte?
> "A. The North Butte, yes."

Testimony of E. A. Austin (Pr. Tr., p. 80 *et seq.*):

> "Q. At that time (time of conversation) did

he explain to you where the Anaconda Fraction was located?

"A. Yes sir, he did.

"Q. What did he say?

"A. He told me that the claim was located between the Prospector and Mohawk Associations.

"Q. Did he say anything about the Anaconda Fraction being a portion of the original Prospector location?

"A. No sir, he did not.

"Q. In that map, does it show the location of the Anaconda Fraction as claimed by Mr. Adams?

"A. No sir, it does not.

"Q. (Pr. Tr., p. 85.) Did Mr. Adams ever tell you that he claimed a fraction off the Prospector claim?

"A. No sir.

"Q. Did he ever tell you that he had measured the Prospector and that there was an excess in it?

"A. No sir.

"Q. And ask you to cast it off?

"A. No sir.

"Q. When did you first become cognizant of the fact that Adams claimed it was more than 160 acres?

"A. During the winter of 1913 to 1914. I think it was in January, 1914.

"Q. That was after the commencement of this suit?

"A. Yes sir.

"Q. At the time of the commencement of this action did you have any knowledge or information that the Prospector contained more than 160 acres?

"A. No sir."

Cross-examined by counsel for appellant the witness said (Pr. Tr., p. 87):

"Q. What you thought he meant was that the

Prospector stake didn't come up to the Mohawk stake. Was that it?

"A. Yes.

"Q. You thought that he meant that there had been some absolutely vacant ground between the Prospector and the Mohawk?

"A. That the two stakes were not common."

Evidently the Trial Court gave credence to the testimony of the witness Austin and found (Finding of Fact No. 13) that the locators and owners of said Prospector Association Claim, except said Chittick and Muckler, did not acquire notice of the fact that said Prospector Claim contained in excess of one hundred and sixty acres until after the commencement of this action, and that after the acquisition of such knowledge caused said Prospector Claim to be surveyed, the excess cast off and an amended location thereof made.

The appellant would rely upon the legal proposition that having brought home notice of the fact that said Prospector Claim contained an excessive area to two of the owners and locators thereof, that such notice was notice to all. Such, however, is not the law and it is well settled that one tenant in common cannot bind his cotenant.

> "One cotenant cannot abandon the claim because he cannot, by any course of conduct, destroy the interest of his cotenant."
>
> *O'Hanlon* vs. *Ruby Gulch Mining Co.*, 135 Pac. 913.

In a suit brought by one tenant in common against his cotenant to restrain him from using more than

his share of the common waters, the Supreme Court of California say:

"One tenant in common, in so far as he interferes with and works an injury upon the joint property to the damage or injury of his cotenant, is a trespasser to that extent."

Bardton Land Co. vs. *Grafton Water Co.,* 152 Pac. 48.

"One tenant in common cannot by his conveyance, create an easement in the common land which would be good against any of the tenants, except himself."

Pfeiffer vs. *Mulligan* (N. Y. Ct. of Appeals), 84 N. E. 75; 16 L. R. A. (N. S.) 151.

"One tenant in common cannot prejudice the rights of his cotenants."

Lindley on Mines, 3d ed., p. 791.

"The deed of a cotenant purporting to convey a portion of the common estate by metes and bounds is inoperative as against his cotenants."

The Hartford etc. Ore Co. vs. *Miller,* 41 Conn. 112;

3 Morrison's Mining Reports, 353.

"The fact that two persons as tenants in common own coal lands does not authorize one of them to enter into an agreement which would bind his cotenant to sell the unmined coal in the absence of authority from his cotenant."

McKinley vs. *Peters et al.,* 3 Atl. 27.

"Neither a joint tenant nor a tenant in common can do any act to the prejudice of his cotenants in their estates. This is the settled law and hence a conveyance by one tenant of a parcel of the general tract owned by several is inoperative to impair any of the rights of his cotenants."

Devlin on Deeds, 2d ed., p. 109.

These authorities, we respectfully submit, fully sustain our contention that the acts and declarations of Chittick and Muckler instructing or permitting the appellant to take up the excess area contained within the Prospector Claim were inoperative. They could not bind any of the cotenants of said Chittick and Muckler and they were not binding even upon said Chittick and Muckler unless they were ratified by their co-owners.

The authorities quoted by appellant in his opening brief, to sustain his contention that Muckler and Chittick were competent to bind their cotenants, are not in point.

The case of *Crary* vs. *Campbell,* 24 Cal. 634, was an action for damages brought by the plaintiff Crary against the defendants Campell and Powell for having cut the embankment of a ditch and thereby having caused quantities of water to flow down plaintiff's flume by means whereof the flume was injured together with plaintiff's mining property. The defendants set up, among other things, that prior to the cutting by them of the embankment they had secured the consent to do so from "plaintiff's managing agents, one of whom was jointly interested with the plaintiff", and that said embankment had been cut with the consent and assistance of such agents. Upon the trial the defendants tried to prove that one of the plaintiffs and co-owners of the flume and property had given his consent to the cutting. Objection to this testimony by the plaintiff was sustained. On appeal the Court decided that it was error to exclude the proffered testi-

mony. We find no fault with this decision as the law is well settled that a release by one of several against whom a tort has been committed is a release by all.

The *Sharkey* vs. *Cadiani* case, 85 Pac. 219, 7 L. R. A. (N. S.) 791, was decided upon questions of abandonment and equitable estoppel, both of which were pleaded. The Court say, page 792:

> "The answer having denied the material allegations of the complaint, averred that plaintiffs had abandoned all interest in the premises inconsistent with the boundaries of the Doctor Lode, and that by reason of their conduct they ought to be estopped to assert any claim thereto, setting out the facts which, it is asserted, constitute the alleged impediment which the law raises to preclude the maintenance of this suit."

In the Cadiani case the plaintiffs tried to recover a portion of mining ground originally located by them and taken in by the defendant when he made his location. It appears that when defendant staked the overlapping claim two of the plaintiffs assisted him in marking his boundaries and all the cotenants, except two, were on the ground and saw defendant develop the same during eighteen months at an expenditure of $8000. The Court say:

> "The right of the defendants to the Doctor claim (the overlapping location) depends upon acts of the plaintiffs constituting an alleged estoppel tantamount to an abandonment. It will be remembered that two of the cotenants made some markings on the ground to evidence part of the boundaries of the Doctor claim. All the cotenants, except Moore and Zimmerman were at the mines and saw Cadiani (defendant) working

> on the Doctor claim to which for eighteen months they made no objections but congratulated him on the progress he was making in cutting the tunnel until he had expended about $8000 and discovered valuable ore—Cadiani (defendant) was a novice in mining while Dyson and Standish and most of the other cotenants were experienced * * * The means of information were, therefore, not equal to the respective parties and this being so an estoppel may arise to prevent the plaintiffs from asserting their rights * * * the plaintiffs, who are experienced miners * * * ought to be estopped to assert that they had any interest in conflict with the claim of Cadiani * * * to allow them to assert an adverse claim would be violative of every principle of equity and result in rewarding them for encouraging the development of the property."

It further appears that Sharkey, who negligently failed to ascertain the boundaries of his and his cotenants' claim and who encouraged the development of the overlapping portion, was the "superintendent and managing partner" of the plaintiffs.

An examination of this case shows that it was decided solely upon the equitable principle of estoppel.

In the case at bar no such principle is applicable. The appellant, as already pointed out, was an experienced miner. He did no more upon the premises located by him than what was required under the law as annual assessment work and he has practically expended no money in developing this property. At no time did he act in accordance with equity and give the appellees any notice of his claim or attempt to give them notice and explain his position, but, on the contrary, he hided himself and induced the appellees

to believe that he had taken up a portion of unappropriated public domain, lying between the Prospector Claim and the Mohawk Claim. The appellee, Yukon Gold Company, as soon as it saw the appellant working in the vicinity of its properties and believing him to claim a fraction between said two claims, served a notice upon him, informing him that he was trespassing upon its properties and to desist therefrom. (Pr. Tr., p. 44.) Prior to this time the appellant had given E. A. Austin, the manager of said Yukon Gold Company, to understand that he had located his fraction between said two claims (Pr. Tr., pp. 85 and 87), and the said Austin thereafter investigated the location of this alleged fraction (Pr. Tr., p. 90) where he testifies on cross-examination as follows:

> "Q. You did take the trouble to look it up, then?
>
> "A. I took the trouble to look up and found out that the fraction did not lie between the Prospector and the Mohawk, which Mr. Adams claimed it did."

Would it not have been fair and equitable for appellant to have informed the appellees of his true position, after the service of the trespass notice upon him, when that notice gave him full knowledge that they believed him to be on property which lawfully belonged to them? But instead of giving them notice, as the law required him to do, he kept silent and kept all knowledge as to the excess area in said Prospector Claim hidden from them. The appellant's position cannot recommend itself to the consideration of a court of equity. Counsel in their brief quote "Snyder on

Mines #1471," as authority for their contention that one tenant in common can bind his cotenant. Counsel only quote a portion of the section. An examination of the entire paragraph discloses that the author simply speaks of the right of one tenant to grant a lease or license to a third person to mine upon the common estate and in the same section says "if it is lawful for one tenant to work the common property in a prudent, safe and minerlike manner, there could be no question, it would seem, as to his authority to permit another to do so, provided, of course, that the cotenant not joining was not thereby injured to a greater extent than he would be if the cotenant granting the license mined it himself." This clearly applies to and concerns only the right of one cotenant to grant a lease or license to another to enter upon the common estate and there act for and in the place of the granting cotenant and has nothing to do with the right of one cotenant to cast off or abandon or dispose of a portion of the common estate.

In the case of *"Southern Railway Company* vs. *Meaher,* 238 Fed. 538," also cited by appellant in his brief to sustain his contention, the Court say: "That in a joint action by three plaintiffs to recover for the conversion of earth removed from a tract of land, there can be no recovery by any of the plaintiffs if one of them consented to the removal." And "In a suit by cotenants to recover for the conversion of earth removed there can be no recovery by any of the plaintiffs, if one of them consented to the removal. A plea that sets up that the damage was done by the

consent or direction of one of the plaintiffs, presents a good defence to the action, the plaintiff who consented could not recover, and all persons suing in the same action must be entitled to recover or none can.

Both authorities quoted are inapplicable to the case at bar.

On page 18 of his opening brief, counsel for appellant quote the case of *Ward* vs. *Warren et al.,* 82 N. Y. 265, as authority for their contention that notice to one or two cotenants is notice to all and that notice to Chittick and Muckler was notice to all their cotenants. Again an examination of this case discloses a state of fact entirely different from the facts in the case at bar. In the New York case one of the cotenants was the agent for the remaining cotenants and, of course, as such agent, he stood in the shoes of his principals and notice to him was notice to his principals. The Court say, "It was shown that the passage way across the defendants' lot had been used by plaintiffs for 48 years. The three defendants claim to have had no knowledge of the passage way but the trial court from the evidence found otherwise. We think there was evidence sufficient to sustain the finding that the user was with such knowledge. The defendants have had the personal charge letting them to tenants, keeping them in repair and collecting the rents. All these facts were submitted to the trial judge, although the defendants under oath denied any knowledge of the user, and it was for the judge to determine how much weight under the circumstances should be given to such denials and what the fact in

truth was, and during the whole period of time, since 1848 (to 1880 when the case was tried) one or the other of the brothers was the agent of all the owners for collecting the rents, letting and managing the premises. Where one tenant in common acts for all the tenants there is no more reason why his knowledge may not be attributed to his cotenants just the same as the knowledge of any other agent would be. What an agent knows about the use of the easement in the premises committed to his charge must be attributed to his principal." There is no testimony in the case at bar showing that Chittick or Muckler, or either of them were in any way in charge of the Prospector claim and it nowhere appears that they acted as agents or had any authority to act as agents of their cotenants.

The trial court found that none of the owners of said Prospector claim had any notice or knowledge concerning the excess except said two named persons and it was for the trial judge to weigh the evidence and say what in fact the truth was.

(2) *Did the Court err in finding that appellant could have located the excess area contained in the Prospector Association Claim in a more compact form than was done by him, and did he make a "Shoestring location"?*

Section 2331 of the Revised Statutes provides that claims upon unsurveyed public lands shall conform "as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys".

The general rule has been adopted by the Land Department that a (placer) mining claim located by one or two persons must be such as can be entirely included within a square forty-acre tract, in other words, that it must not exceed 1320 feet in length.

In re Snowflake Placer, 37 D. Dec. 250.

"It is the policy of the government to have the entries, whether they be of agricultural or mineral lands, in compact form. Congress has repeatedly announced this principle, and the Department has always and does now insist upon it. The public domain must not be cut into long and narrow strips, and no 'shoestring' claims should ever receive the sanction of this Department."

Id.

While it is true that the courts are not bound to follow the decisions of the Land Department, it is nevertheless an established fact that courts will give great weight to the opinions of the officers of the Department, whose especial duty it is to administer the Public Land Laws and will follow them whenever possible.

"The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons."

United States vs. *Moore,* 95 U. S. Reports, 160-163.

The statute in positive terms provides that mining locations must, *as near as practicable,* conform with the system of public land surveys and the rectangular subdivisions thereof.

This provision constitutes and is as much positive mining law as the provisions concerning the making of a discovery or the markings of the boundaries and it is as incumbent upon the appellant to prove that his locations conform "as near as practicable" with the system of public lands surveys as it is necessary to show that he made a discovery and marked his boundaries, and it is incumbent upon the court to give the statutory provisions "as near as practicable" some meaning.

That the two locations do not comply with the system of public land surveys is self-evident and appellant fails to show why they do not. The trial court expressly finds that he could have made both locations in some more compact form (Finding of Fact numbered 10) and the same finding was arrived at by the Hon. F. E. Fuller when he tried this cause. The latter in his opinion, hereto attached and made a part of this brief, says: "I am satisfied that it is incumbent upon a person making a location which does not conform to the rule, to establish by evidence the impracticability of conforming thereto. In other words, he must show by some evidence that on account of the situation of the land, and the area of land that is open for location, that it is impracticable to locate a tract in such form as is required by the rules of the Land Office. This the plaintiffs seems to me to have failed to establish in this case." Appellant in his opening brief argues that it was impossible to locate this excess area in a more compact form because "the record shows that the ground to the south

of the Prospector Claim was appropriated as the "Mohawk Association Claim."

But it is not shown that the excess could not have been located at either on the westerly or the easterly side of said Prospector Claim. Besides the question as to where to take up the excess area could not be affected or determined by the location of adjoining claims. It was not a question of taking up a portion of unappropriated land lying between portions lying between existing mining claims, but it was a question of taking up a portion of land of an already existing location. It could not be taken up outside the boundaries of the Prospector Claim. The appellant testifies (Pr. Tr., p. 69) that he tried, as near as possible to take up the entire excess and that this was more than twenty acres. He had then an opportunity to make the ideal location, contemplated by the rules of the Land Department and in conformity with the statute, and he was bound to observe the injunction that a placer location must conform, as "near as practicable," with the system of public land surveys.

The fact that appellant made his discovery at the place he made it, in Flat Creek, gave him no right to stake a portion of land averaging 127 feet in width and being 5280 feet in length, for the place where the discovery is made does not determine the shape of the location. But he could have taken up the excess area at the westerly end of said Prospector Claim in a compact form and still have taken in the place of discovery.

The fact that Chittick and Muckler told him to stake at either end or side of said Prospector Claim gave appellant no authority to make his shoestring locations, for they could not authorize him to disregard the plain provisions of the statute.

The question of "shoestring locations" has, to our knowledge, never come squarely before any court of last resort, but the point has been touched upon by this Honorable Court in

Hanson vs. *Craig,* 170 Fed. 62,

where this Honorable Court, speaking through Mr. Justice Ross, refers to the fact that the placer location under consideration in the Hanson-Craig case was two miles long and six hundred and sixty feet wide. The Court quotes the language of the Land Department, in *In re Snowflake, supra,* with approval and considers it pertinent to apply that language to the claim in controversy. In that case the location was about seventeen times as long as it was wide and this Honorable Court, by implication at least, frowned upon its shape. In the case at bar the first fraction located by appellant is twenty-two times as long as it is wide and his second location is more than forty-two times as long as it is wide and no reasons are advanced for their phantastic shapes.

There is not the slightest attempt to show compliance with the requirements of the statute and such locations cannot commend themselves to the consideration of the Court.

There is one other point raised in appellant's open-

ing brief to which we desire to reply. On page 31 of his brief appellant finds fault with the trial court for finding that he carved his fractions out of the Prospector Claim without making the boundary lines conform with the original lines of the Prospector, and he complains that the trial court based its findings upon a map not identified and not proven by any witness to be correct. An examination of the map in question, defendants' "Exhibit A," will show the divergence between the Prospector lines and the Anaconda lines and that the fractions are carved out of the body of the Prospector Claim, giving the latter claim a new course. Counsel in their brief seem to have overlooked the fact that the appellant testified to the correctness of the map himself and that it was therefore unnecessary to call any further witnesses upon this point. On page 69, Pr. Tr., the appellant testifies:

> "Q. This map (defendants' Exhibit A) is correct, isn't it?
> "A. As near as I remember."

We believe that we have shown wherein the findings of fact made by the trial court are supported by substantial testimony and that the conclusions of law drawn therefrom are correct and that the decree of the lower court should be sustained.

Very respectfully submitted,

R. F. Lewis,
Richard C. Harrison,
Henry Roden,
Attorneys for Appellees.

DISTRICT COURT OF ALASKA,

FOURTH DIVISION.

DECISION.

By HON. F. E. FULLER.

No. 1521.

S. C. ADAMS,
Plaintiff,
vs.
YUKON GOLD COMPANY ET AL.,
Defendants.

This action was tried before the Court, without a jury, at the Special, July, 1914, Term at Iditarod, and decision reserved.

The plaintiff, in his complaint, alleges that he is the owner of the Anaconda Fraction Placer Mining Claim, 120 feet in width, by 2640 feet in length; and of the Anaconda Fraction Number Two Placer Mining Claim, 125 feet in width, and 5280 feet in length, the latter claim including within its boundaries the former.

The answering defendants set up that the defendant Yukon Gold Company is the lessee in possession, and owner of an undivided part of the Prospector Association Placer Mining Claim, and the other defendants allege that they are the owners of undivided parts of this claim, and the lessors of the Yukon Gold Company, and that the ground claimed by the plaintiff is within the boundaries of the Prospector Claim.

The plaintiff's evidence tended to show that on May 23, 1911, he placed stakes at the corners of the Anaconda Fraction claim and blazed trees along the boundaries thereof, and that prior thereto he had discovered gold-bearing gravel along Flat Creek, which runs through this location, and within the boundaries of this location; that subsequently he placed stakes at the corners, and blazed trees along the boundaries, of the Anaconda Fraction Number Two, which included the claim theretofore located as the Anaconda, but was five feet wider, and 2640 feet longer. Plaintiff also testified that he did more than $100.00 worth of work on the ground during 1912, and also did some work in 1913.

The Prospector Association Claim, to which the defendants assert title, was located in April, 1909, by eight persons, and, as described in the location notice, was 1320 feet in width, by 5280 feet in length, and contained 160 acres, but it was conceded that as marked upon the ground, the claim contained about 177 acres, or more than 17 acres in excess of the amount allowed by law to be located.

The plaintiff became aware of this excess, and notified some of the locators of the Prospector thereof, and it seems that he was informed by them that in case there was any excess, they were willing that he should locate the same wherever he desired, leaving them a claim 1320 feet by 5280 feet. Some of the owners of the Prospector were not within the vicinity, nor known to the plaintiff, and their permission to locate any excess was never obtained, nor does it ap-

pear that they had knowledge thereof prior to the commencement of this action. The defendants contended that, as against the owners of the Prospector having no knowledge of any excessive location, the plaintiff could acquire no rights by his attempted location, inasmuch as they were simply tenants in common of the land, and that one co-tenant could not release any rights of his co-tenant, or convey any of his interests, without the authority so to do. In the winter of 1914, some months after the institution of this action, the defendant, Yukon Gold Company, caused a survey to be made of the Prospector Claim, and then established a new boundary at the lower end thereof, throwing off the excess of over 27 acres, but leaving the other boundaries undisturbed, and including within such boundaries all of the ground located by the plaintiff, except the small strip running across the ground so abandoned.

The defendants urged that the plaintiff's locations were entirely void, because not made in conformity with Section 2331 of the Revised Statutes, requiring claims made upon unsurveyed lands to conform "As near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys."

If the decisions of the Land Office and its regulations are to be followed, defendants' contention must be sustained. For following the decision in *In re Snowflake Placer* (37 L. D. 250), the rule has been adopted that a claim located by one or two persons must be such as can be entirely included within a

square 40-acre tract; in other words, that it must not exceed 1320 feet in length. Undoubtedly, the plaintiff could not obtain a patent to his claim, in the form in which it was located. While the courts may not be required to follow this rule rigidly, and undoubtedly should give some effect to the words of the statute "as near as practicable," I am satisfied that it is incumbent upon a person making a location which does not conform to the rule, to establish by evidence the impracticability of conforming thereto. In other words, he must show by evidence that on account of the situation of the land, and the area of land that is open for location, that it is impracticable to locate a tract in such form as is required by the rule of the Land Office in segregating a piece of land adapted to ordinary mining purposes. This the plaintiff seems to me to have failed to establish in this case. From the situation of the land it is not apparent that he could not have located his claim in a more compact form, and a location, the length of which is more than twenty times its width, does not seem to me reasonably to comply with the law. Although various decisions of the Land Office hold "Shoestring locations" invalid, the courts do not seem to have gone to that length; but the Circuit Court of Appeals for this Circuit seems to intimate that the construction of the law adopted by the Land Office is a proper one for the courts to follow. (*Hanson* vs. *Craig,* 170 Fed. 62.)

This conclusion makes it unnecessary to consider whether or not the plaintiff could have made any valid location within the boundaries of the Prospector Claim

as originally staked, under the permission he had from a part of the owners, and without the knowledge or consent of all, within the rules laid down in *Zimmerman* v. *Funchion* (161 Fed. 859); *Jones* v. *Wild Goose M. & T. Co.* (177 Fed. 95); *Price* v. *McIntish* (121 Fed. 716); *Sharkey* v. *Candiani* (48 Ore. 112; 85 Pac. 219; 7 L. R. A. [n. s.] 791).

Findings of fact in conformity with these views, and a decree dismissing the action, may be prepared and submitted. On account of the distance from place of trial at which the attorneys for the parties herein reside, defendants may have sixty days to prepare, serve and file their findings, and the plaintiff may have sixty days after service thereof within which to prepare and file any proposed amendments and objections.

Dated at Fairbanks, Alaska, September 18, 1914.

(Sgd.) F. E. FULLER,
District Judge.